IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA
AND
R. ZAHRADNICK, Warden,

Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

CAROLYN J. COLVILLE,
Colville and Dunham
2 North First Street
Richmond, Virginia 23219

(Court-appointed Counsel for Petitioner)

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

INDEX

TABLE OF AUTHORITIES

Page

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5283

JAMES A. JACKSON,
Petitioner

v.

COMMONWEALTH OF VIRGINIA
AND
R. ZAHRADNICK, Warden,
Respondents

On Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit [A. 30-35] is not reported. The opinion of the United States District Court for the Eastern District of Virginia [A. 25-28] is also not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered August 3, 1978. The petition for certiorari was filed on August

25, 1978 and was granted on December 4, 1978 [A. 64]. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in deciding if the Petitioner's due process rights had been violated, the United States Court of Appeals for the Fourth Circuit erred in applying the rule in *Thompson* v. *City of Louisville*?

STATEMENT

On March 27, 1975 Petitioner James A. Jackson was tried on a plea of not guilty, without intervention of a jury, before the Honorable Ernest P. Gates, Judge of the Circuit Court of Chesterfield County, Virginia, upon an indictment charging him with the murder of Mary Houston Cole (hereinafter Mrs. Cole). [Tr. 4-7]. The evidence consisted of the testimony of various witnesses on behalf of the Commonwealth as summarized before.

Petitioner Jackson first met the deceased, Mrs. Cole, a cook for the Chesterfield County Jail, when he was an inmate-trustee there. [A. 49-50]. Upon his release, Mrs. Cole befriended him, with some indication that she wished him to stay with her. Contrary to this desire, Petitioner Jackson arranged to stay with Mrs. Cole's son, Curtis, and his family. [Tr. 50]. Apparently, Petitioner Jackson and Mrs. Cole met one another on several occasions during the approximately one-

month period that he stayed with the Curtis Cole family. [Tr. 51, A. 39].

On the day of Mrs. Cole's death, August 24, 1974, Petitioner Jackson began drinking during the morning. [A. 42]. According to the testimony of Sally Cole, Petitioner Jackson and her husband Curtis shot at bottles placed on a tree trunk in the backyard during the early afternoon. [A. 41-42]. By that time of day Petitioner Jackson had drunk already "several bottles" of alcoholic beverage. [A. 42]. While Curtis Cole did not recall shooting any bottles that day, he did remember the gun from a previous occasion when Petitioner Jackson returned home from one of his several trips to North Carolina and showed it to him. He remembered that they shot the gun at that time. [A. 45-47].

Between 2:30 and 3:00 p.m. Curtis drove Petitioner Jackson to the Bi-Rite Super Market where the latter talked for five minutes with Mrs. Cole, also present at the store. [A. 47-48]. By that time in the afternoon, Curtis described Petitioner Jackson as being "pretty well loaded." [A. 47]. Mrs. Cole bought a six-pack of beer [A. 87], and Petitioner Jackson bought twelve cans of beer. [A. 48].

After completing her grocery shopping, Mrs. Cole returned to her home. After preparing dinner she announced to her husband that she might be going to Carolina and then left in the car. [A. 40]. By that time she had consumed two to three cans of beer. [A. 40].

Between 5:30 and 6:00 p.m. that afternoon, Mrs. Cole drove to her son's home and picked up Petitioner Jackson. [A. 41]. They sat in the car for a period of time, and then Mrs. Cole called to her son Curtis and told him that she was going to the diner for dinner. [A. 48-49]. Salley Cole testified that she could not recall hearing any argument between her mother-in-law and Petitioner Jackson prior to the time they departed. [Tr. 39].

The two drove to the Chesterfield Diner where they were observed by three police officers. Both Mrs. Cole and Petitioner Jackson went over to see Deputy Sheriff David A. Andrews. They approached him in what was described as an "everyday joking manner." [A. 51]. In addition, Petitioner Jackson was remembered as being "boistrous." [A. 55]. Both appeared to have consumed a quantity of alcohol and Andrews agreed that Petitioner Jackson "was in a pretty rough condition." [A. 52]. This was evidenced by his staggering footsteps and his bloodshot eyes. [A. 52]. When asked if both were "loaded," Andrews applied in the affirmative as to Petitioner Jackson. [A. 55].

When Andrews, Mrs. Cole and Petitioner Jackson went outside, the latter showed Andrews a .38 revolver that had been "sticking in back of his pants." [A. 52, 54]. Mrs. Cole told Andrews that she had a knife in the front seat of the car. [A. 53]. The knife was characterized by Deputy Sheriff Andrews as a "standard butcher knife." [A. 53]. Andrews examined the gun and asked Petitioner Jackson if he could not keep

the gun until the latter had sobered up. [A. 55]. Petitioner Jackson said that they were going straight home "to engage in some form of sexual activity." [A. 55]. Mrs. Cole was present during this entire conversation, and when Petitioner Jackson announced their intention to have sexual relations, Mrs. Cole smiled and laughed. [A. 55-56]. Apparently, Andrews gave him back the gun at this point.

The deputy sheriff advised Mrs. Cole to drive the car since Petitioner Jackson was "too drunk" to drive [A. 55] and because "she didn't look like she had been drinking enough where she couldn't drive them home." [A. 53]. He admitted that he wanted to get the two of them out of the diner in order that he could eat his meal without their presence. [A. 53-54]. From that point onward, the facts are based on a statement later given by Petitioner Jackson to the police and testified to by Mark E. Wilson, a detective for the Chesterfield County Police Department.

Before driving away from the diner, Mrs. Cole and he exchanged words which led to Mrs. Cole trying to stab him with her butcher knife. The words were to the effect that if she could not have him then no other woman would have him. Petitioner Jackson explained that the argument centered on his refusal to have sex with her. He then pushed her away and struck her on the back of the head with the butt of the revolver. [A. 60].

Admittedly frightened and unsteady, he then crossed the street to the Bi-Rite Super Market to call

a cab. [A. 58]. Mrs. Cole drove up and persuaded Petitioner Jackson to get back into the automobile with her. From there Mrs. Cole drove to a secluded church parking lot where the two of them began "messing around." [A. 58]. In this period of time together, the Petitioner drank a fifth of Old Crow, a fifth of Wild Turkey and a pint of something else. Mrs. Cole helped him drink both the whiskey and an undetermined amount of beer. [A. 59-60].

At the church the Petitioner remembered that Mrs. Cole again sought sexual relations, which he refused. [A. 58]. With both of them now outside the car, Mrs. Cole, naked from the waist down, picked up the butcher knife and tried to stab him. As a warning, he fired the revolver six times into the ground while Mrs. Cole repeated her attacks with the knife. He reloaded the revolver, and Mrs Cole threw down the knife and tried to wrest the gun away from him. [A. 58]. In the ensuing scuffle two shots were fired killing Mrs. Cole. [Tr. 105]. The time of death was undisclosed in the record.

Petitioner Jackson fled to Fayetteville, North Carolina in Mrs. Cole's car. He went to Florida and later returned to Fayetteville where he was arrested and returned to Chesterfield County, Virginia. [Tr. 110].

The autopsy report, introduced as Commonwealth's Exhibit Number 13, indicated that one bullet had passed through Mrs. Cole's left breast from left to right and that the fatal bullet had passed through her

left chest. The deceased's blood alcohol content was 0.17 by weight by volume. [Tr. 81, 114].

At the conclusion of the evidence, the Commonwealth's Attorney declined to argue the case on the basis of seeking a conviction for first degree murder because of the degree of intoxication of the deceased. [Tr. 111-114]. However, the court observed the color photograph introduced into evidence as Commonwealth's Exhibit 9 and referred to the mutilation, which was never pointed out in the autopsy report. [Tr. 115]. The court expressed the opinion that it was "a very horrible picture." [Tr. 115].

After expressing the opinion that if the Petitioner had been drunk he would have been arrested by the police officers, [Tr. 116], the court found Petitioner Jackson guilty of first degree murder. [Tr. 117].

Following a pre-sentence report, the Judge sentenced Petitioner Jackson to thirty (30) years in the Virginia State Penitentiary. [Tr. 125]. Counsel for Petitioner Jackson moved to set aside the judgment as contrary to the law and evidence, which motion was denied. An exception was noted. [Tr. 125-126].

On the basis of the above ground, the conviction was appealed unsuccessfully to the Supreme Court of Virginia on February 10, 1976. Thereupon, Petitioner Jackson filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia on June 18, 1976. In addition to allegations concerning defects in the indictment and the

involuntariness of his confession, he alleged that the conviction was contrary to the law and fact in that it was not supported by evidence of malice or premeditation. [A. 6].

The Honorable D. Dortch Warriner of the United States District Court for the Eastern District of Virginia dismissed the first two allegations on the grounds that he had failed to exhaust his State remedies on those issues. He then ordered that a writ of habeas corpus be issued and a new trial be commenced within sixty (60) days from the entry of the Order on October 1, 1976. [A. 28]. In a memorandum filed on that same day, the court found that there was a lack of evidence showing the premeditation required for a conviction of murder in the first degree. [A. 25]. The court applied the rule that Petitioner Jackson was entitled to the relief only if the record was devoid of evidence to support the conviction. The Commonwealth of Virginia filed a timely appeal to the United States Court of Appeals for the Fourth Circuit. [A. 29].

In a *per curiam* opinion dated August 3, 1978, the United States Court of Appeals for the Fourth Circuit reversed the Order of the district court by finding "some" evidence of premeditation in the fact that Petitioner Jackson had the capability and time to reload his revolver and from the fact that Mrs. Cole was shot twice. [A. 33]. The court felt that it need not consider whether the trial judge was "warranted in finding that there was premeditation beyond a reasonable doubt." [A. 33-34]. In so holding, the court indicated that it needed further guidance as to the applicability of *In re Winship*, 397 U.S. 358 (1970) and then went on to apply the rule of *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960) indicating that a federal court must deny the writ of habeas corpus if there is "some" evidence of each of the elements of the crime. [A. 34].

SUMMARY OF ARGUMENT

Under the rule of *In re Winship*, 397 U.S. 358 (1970) the State of Virginia was under a constitutional obligation to prove Petitioner Jackson's guilt beyond a reasonable doubt. If the State failed to meet the burden and yet convicted him of first degree murder then Petitioner Jackson was deprived of liberty without due process of law. This is exactly what the Petitioner alleged when he filed his Petition for Writ of Habeas Corpus after he had exhausted his State court remedies.

In his petition he contended that his conviction was not supported by evidence of premeditation. [A. 6]. Both the federal district court in granting the writ and the federal appellate court in denying the writ felt obligated to follow the rule first enunciated in *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960) whereby the writ of habeas corpus could be issued only if the record was completely devoid of evidence of the offense, in this case premeditation. In applying this rule to the facts of the case the two courts came

up with different results. The appellate court felt obligated to follow this rule even though it seemingly had doubts whether this was the proper rule to follow in light of the holding of *In re Winship*. [A. 34].

It is respectfully submitted that the writ of habeas corpus should be issued where no rational trier of fact could find a defendant guilty beyond a reasonable doubt. This conclusion can be reached by following *In re Winship* to its logical conclusion: if after giving the proper deference to the state court determination it is found that no rational trier of fact could have found the defendant guilty of the offense beyond a reasonable doubt, then the defendant has lost his liberty without due process of law. He would then in fact be innocent of the charge of which he was convicted.

The proper historical remedy in this situation has been the use of the writ of habeas corpus. The traditional scope of the writ of habeas corpus is to assure that an innocent person is not suffering the loss of liberty. *Stone* v. *Powell*, 428 U.S. 465, 491 n.31 (1976). Thus where the guilt of an accused has not been constitutionally established, the writ of habeas corpus is the appropriate remedy. It was the duty of the federal courts to determine whether the Petitioner's due process rights had been abridged.

Given the physical condition of the accused at the time of the death and the surrounding circumstances of the case, no rational trier of fact could have found Petitioner Jackson guilty of first degree murder be-

yond a reasonable doubt. As such he is entitled to the issuance of the writ of habeas corpus.

ARGUMENT

I

TO GIVE SUBSTANCE TO THE HOLDING OF *IN RE WINSHIP*, IT WAS THE DUTY OF THE FEDERAL COURTS TO MAKE A DETERMINATION OF WHETHER A RATIONAL TRIER OF FACT COULD HAVE FOUND THE PETITIONER GUILTY OF FIRST DEGREE MURDER BEYOND A RESONABLE DOUBT.

A. When The Legislature Made Premeditation An Element Of The Offense Of First Degree Murder, The State Was Under An Obligation To Prove That Element Beyond A Reasonable Doubt.

The landmark case of *In re Winship*, 297 U.S. 358 (1970) as clarified seven years later by the rule of *Patterson* v. *New York*, 432 U.S. 197 (1977), stands for the proposition that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." (432 U.S. at 210). Leaving aside the concern that the State could circumvent the requirements of *In re Winship* by redefining the offense (dissenting opinion of Justice Powell, *Patterson* v. *New York*, 432 U.S. at 224), the holding is clear that once a State defines an of-

fense, the prosecution must prove each element of the offense beyond a reasonable doubt.

In the context of the present factual situation, the applicable statute, Virginia Code Annotated § 18.2-32, defines murder of the first degree as:

> [m]urder other than capital murder, by poison, lying in wait, imprisonment, starving or by any *willful, deliberate, and* premeditated killing, or in the commission of, or attempt to commit, arson, rape, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree . . .
>
> All murder other than capital murder and murder in the first degree is murder of the second degree . . . . [emphasis added].

By placing premeditation in the definition of the offense, the state legislature chose to place an obligation on the prosecution to prove that element beyond a reasonable doubt. Despite the fact that the accused was convicted, if that burden was not met then the accused suffered a deprivation of liberty without due process of law. This is exactly what Petitioner Jackson alleged in his Petition for Writ of Habeas Corpus when charged that his conviction was unsupported by evidence of malice and premeditation. [A. 6]. To reinforce his claim he recitated that at the time of the offense he was highly intoxicated.

It is a matter of basic hornbook law, long held to be true in the Commonwealth of Virginia, that a mind

may be so bewildered from intoxicating beverages as to be entirely incapable of deliberation. *Cody* v. *Commonwealth*, 180 Va. 449, 23 S.E.2d 122 (1942); *Drinkard* v. *Commonwealth*, 165 Va. 799, 183 S.E. 251 (1936); *Honesty* v. *Commonwealth*, 81 Va. 283 (1886); *Willis* v. *Commonwealth*, 73 Va. (32 Gratt.) 929 (1879). This apparently was the basis for his appeal.

While an analysis of *Patterson* v. *New York* seems to show that the state may place a burden of persuasion on the defendant to prove an affirmative defense, doubt exists concerning the issue of whether a state by statute could put the burden of persuasion on the accused to prove intoxication before mitigating the offense. In *Patterson* v. *New York* the court intimated that defenses which negate "any facts of the crime which the State is to prove" are in a different category. (432 U.S. at 207). Certainly intoxication could negate the fact or element of premeditation which by statute the State is to prove beyond a reasonable doubt, and thus seemingly it would fall within this different category of defenses.

Assuming, however, that the State could have placed the burden of persuasion on the defendant (i.e. Petitioner Jackson) and assuming he could not meet this burden, the fact remains that the legislature chose not to do so. According to the statute as it stands, the State was and is required to prove the element of premeditation beyond a reasonable doubt. It is no answer that the offense could have been defined differently. It is not the duty of the judiciary to

look at what the legislature could have done. Instead, it must look at what the legislative body has actually done.

This is entirely consistent with the reasoning of the recent decision of *Sanabria* v. *United States*, 46 U.S.L.W. 4646, 4650 (U.S. June 14, 1978) where, in the context of a question of double jeopardy, the Court held:

> It is Congress and not the prosecution which establishes and defines offenses. Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses . . . But once Congress has defined a statutory offense by its prescription of the 'allowable unit of prosecution' . . . that prescription determines the scope of protection afforded by a prior conviction or acquittal. Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on this congressional choice. [internal citations omitted].

In that case Congress could have chosen to define the elements of the offense differently and thus conceivably could have avoided the issues of double jeopardy. However, this Court clearly said that once a statutory offense is defined, it was the duty of the court to look not at what Congress might have done but to look at what it actually did.

In this case where the legislature did not choose, if indeed it could choose, to put the burden on Petitioner Jackson to prove his intoxication, it is no answer to

say that the legislature could have legally done so. The burden of proving premeditation remained with the State. This burden was neither increased or decreased by any attempt by the accused to discredit the possibility that he was so intoxicated as to be incapable of premeditation. In any event any evidence offered by the accused did not change the fact that the risk of persuasion remained with the Commonwealth. *Commonwealth* v. *Rose*, Pa., 321 A.2d 880 (1974).

Petitioner Jackson maintains that the Commonwealth of Virginia did not meet its burden of persuasion in his individual case. The question then remains as to the proper standard to be applied by a federal court in deciding if it has jurisdiction to afford relief when this type of allegation is made.

B. The Court of Appeals Was Incorrect In Its Determination That *Thompson* v. *City of Louisville* Was The Proper Rule To Follow In Granting Or Denying The Writ Of Habeas Corpus.

Both the federal district court and the court of appeals felt that the proper standard to apply to the facts of the case was the rule of *Thompson* v. *City of Louisville*. In that case this Court held that it was a violation of the due process clause for a conviction to stand when there was no evidence to support it. At the time the case was decided, this Court had not yet articulated its stand that the Constitution protects

against a conviction "except upon proof beyond a doubt of every fact necessary to constitute the crime for which he is charged." [*In re Winship*, 397 U.S. 358, 364 (1970)]. Instead this Court relied on the reasoning in *DeJonge* v. *Oregon*, 299 U.S. 353 (1937) that stated that a conviction based on a charge that was not made denied due process, to hold that "it is a violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *City of Louisville, supra*, at 206. That decision should be perceived as one step in the process of determining how much evidence is sufficient to convict in a criminal setting.

Certainly if one was convicted when the record was devoid of any evidence of the crime then certainly the person was convicted without proof beyond a reasonable doubt. Once *In re Winship* held that the due process clause required beyond a reasonable doubt (397 U.S. at 364), then any person whose rights would be protected by the holding in *Thompson* v. *City of Louisville* would also be protected by the later holding in *In re Winship*.

It is submitted that given the facts of *Thompson* v. *City of Louisville* the conviction was not totally devoid of evidentiary support. The Court assumed "that merely 'arguing' with a policeman is not, because it could not be 'disorderly conduct' as a matter of the substantive law of Kentucky." [362 U.S. at 206]. Yet, certainly, arguing with the policeman was some evidence of disorderly conduct. What the Court

was in effect saying was that no rational trier of fact could draw that conclusion.

It would take remarkably little to amount to some evidence. As Chief Justice Warren expressed in his dissenting opinion in *Jacobellis* v. *Ohio*, 378 U.S. 184, 202 (1964), "[A] mere modicum of evidence may satisfy a 'no evidence' standard . . ." Certainly it would appear that the defendant in *Thompson* v. *City of Louisville* by merely being present in the cafe was some evidence that he was loitering there. Therefore, given that there was some evidence of guilt, the logical explanation for the case was that while there was some relevant evidence that indicate guilt, there really was not enough evidence to convict the defendant. This case along with *Garner* v. *Louisiana*, 368 U.S. 157 (1961) that came after it can be characterized as a search for some standard to decide how much evidence is sufficient to convict. It was not until *In re Winship* that the decision was made.

The Court in the three cases of *In re Winship*, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) and *Patterson* v. *New York*, 432 U.S. 197 (1975) did not expressly address the status of *Thompson* v. *City of Louisville* in light of the later case of *In re Winship*. The meaning of these cases is clear: the United States Constitution requires that in a criminal law setting, the accused must be found guilty beyond a reasonable doubt. This is essentially a question of sufficiency of the evidence, which is the same question covertly present in *Thompson* v. *City of Louisville*. To say that *In re Winship* is

the governing law when a question of sufficiency of the evidence is present does not diminish the importance of *Thompson* v. *City of Louisville.* It was an important step in the realization that a constitutional standard of proof was needed in criminal law that should not be perceived in its correct historical setting.

Once it is accepted that *In re Winship* was the culmination of the process started in *Thompson* v. *City of Louisville,* the question still remains as to the role of the federal court when a petitioner, convicted of an offense in the state court alleges that he or she should not have been found guilty beyond a reasonable doubt and that in fact no rational trier of fact could have found him or her guilty beyond a reasonable doubt.

C. When A State Convicts A Person On Proof Less Than What The Legislature Requires, The Federal System Is Empowered To Intrude Into The Affairs Of The State To Protect The Federal Interest Involved In That Individual Case.

As this Court stated in *Chapman* v. *California,* 386 U.S. 18, 21 (1967):

> Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied.

To analogize the above to the present factual setting, the determination of whether a conviction of the crime of first degree murder should stand when, as alleged, the State has failed to afford the federal constitutionally guaranteed right of the accused to protection of his liberty right unless proven guilty beyond a reasonable doubt, is a federal question.

As the Court noted in *Mullaney* v. *Wilbur,* 421 U.S. 84, 97-98 (1974), the protection afforded by the due process are not lessened or rendered unavailable by the fact that the accused may not be entirely exonerated. The federal question remains viable.

The traditional means of testing the viability of the federal question is through the use of the writ of habeas corpus, whose history dates back to the Judiciary Act of 1789, c.20, § 14, 1 Stat. 81. In tracing this history the Court noted in *Fay* v. *Noia,* 372 U.S. 391, 402 (1963) that

> [I]ts root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment, if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law.

Because of the seriousness of imposing a criminal sanction it should be imposed only on the guilty. The rule of *In re Winship* solidified this notion. It is respectfully submitted that if one is convicted of a crime when no rational trier of fact could have found the accused guilty beyond a reasonable doubt, then that person's imprisonment cannot "conform to the fundamental requirements of law." That person's liberty interest, so emphasized in *In re Winship*, 397 U.S. at 358, has been taken away without due process of law. Until a rational trier of fact finds the accused guilty beyond a reasonable doubt of the crime then technically the accused is innocent of the charge for which he was charged and convicted.

The recent case of *Stone* v. *Powell*, 428 U.S. 465 (1976) viewed the main function of the writ of habeas corpus as the protection of the innocent when one's liberty was unconstitutionally denied. This was explicitly stated in footnote 31 of the opinion:

> Resort to habeas corpus, especially for purposes other than to assure that no innocent suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government.

While the decision expressed concern that the writ should not be expanded under the assumption that state courts did not have the same sensitivity to federal constitutional claims as did the federal courts, (428 U.S. at 493 n.35), footnote 31 strongly suggested that in the case where innocence is strongly implicated, the innocence/guilt value should override the policy of state autonomy.

The clearest and most direct method of how to inquire into the question of innocence is to ask whether there is sufficient evidence to prove each element of the crime beyond a reasonable doubt. If each element of the offense has not been so proven then the innocence/guilt determination of the state has been defective, and it is incumbent on the federal court through the mechanism of the writ of habeas corpus to insure that no one's liberty interests has been denied without due process of law. It was the individual person that the writ was developed to aid, and it is the individual who suffers in prison when the evidence was constitutionally insufficient for a conviction.

Following the reasoning of *Stone* v. *Powell*, certainly the federal courts should be mindful of too great an interference in the business of the state courts and that policy of comity should be followed in cases where the right infringed on is only collateral to the issue of guilt and innocence. However the allegation made by Petitioner Jackson that he was convicted of first degree murder when the Commonwealth of Virginia failed to meet its burden of proving his guilt beyond a reasonable doubt, can hardly be categorized as collateral. It goes directly to the heart of the issue of guilt and innocence and is properly the subject of the writ of habeas corpus.

The standard of whether a rational trier of fact could find a person guilty beyond a reasonable doubt

is certainly one familiar to the federal courts. For years under rule 29(a) of the rules of criminal procedure, the federal courts have been directed to acquit the accused "if the evidence is insufficient to sustain a conviction."

Until recently, a controversy existed among the United States Circuit Court of Appeals can the test to be applied when determining whether an acquittal was in order. Other than the United States Court of Appeals for the Second Circuit, the proper test was the one announced by Judge Prettyman in *Curley* v. *United States*, 160 F.2d 229 (D.C. Cir. 1947), cert. denied, 331 U.S. 837 (1947):

> If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make . . . .

The United States Court of Appeals for the Second Circuit developed its own test in a well-known opinion by Judge Learned Hand where he held that "the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases." *United States* v. *Feinberg*, 140 F.2d 592, 594 (2nd Cir. 1944), cert. denied 332 U.S. 726 (1944). Under this test the federal district courts within the Second Circuit did not take into consideration the reasonable

doubt standard in deciding whether an acquittal was in order. This so-called "Second Circuit" rule was finally overruled in *United States* v. *Taylor*, 464 F.2d 240 (2nd Cir. 1972). Thus, now all of the federal appellate courts and by inference all of the federal district courts now have an expertise to decide whether a rational trier of fact could find a defendant guilty beyond a reasonable doubt inasmuch as the federal district courts must apply essentially the same question in the context of rules of procedure whenever a defense attorney moves for acquittal.

The acceptance of the argument that the writ of habeas corpus is the proper mechanism for determining whether a rational trier of fact could have found the accused guilty beyond a reasonable doubt will not overly burden the federal judicial system. It is generally recognized that upon exhaustion of state remedies, prisoners often apply to the local federal district court for redress due to alleged violations of their constitutional rights. Many, if not most, are dismissed after the state files its motion to dismiss. An evidentiary hearing would rarely happen. This process would not essentially change by allowing federal courts through the means of a writ of habeas corpus to examine whether the evidence was not sufficient for a rational trier of fact to convict beyond a reasonable doubt. Should an inmate make the allegation, the government would need to do little more than to recite why there were grounds for the jury or judge to find the inmate guilty beyond a reasonable doubt. Most

cases could be easily dismissed. After giving the proper deference to the state by viewing the record in the light most favorable to the state *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), only those cases where a definite question of innocence is involved will be pursued. Given the policy beyond the issuance of the writ of habeas corpus, these are exactly the cases the federal district courts should investigate further.

II

NO RATIONAL TRIER OF FACT COULD HAVE FOUND THE PETITIONER GUILTY OF FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT.

A. The Petitioner Was So Intoxicated On The Day Of Mrs. Cole's Death That He Was Incapable Of The Premeditation Required For A Conviction Of First Degree Murder.

As the Court stated in *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960), "Due process is an elusive concept. Its exact boundaries are indefinable, and its context varies according to specific factual contexts." Applying the standards of law argued above to the "specific factual context" it is submitted that Petitioner Jackson was convicted of the crime of first degree murder when in fact the Commonwealth of Virginia failed to meet the burden established by the legislature. The one central fact that permeates the pages of the transcript is that Petitioner Jackson was extremely intoxicated at the time of Mrs. Cole's death and was probably in the same state the entire day. This conclusion can be gleaned from the testimony of a wide variety of witnesses whose integrity and judgment have never been questioned. Witnesses who testified included: (1) Sally Cole, the daughter-in-law of the deceased, who testified that by early afternoon of August 24, 1974 Petitioner Jackson had already consumed "several bottles" of alcoholic beverage [A. 42]; (2) Curtis Cole, the deceased's son, who remembered that between 2:30 and 3:00 p.m. of that same day, before purchasing an additional 12 cans of beer, Petitioner Jackson was "pretty well loaded" [A. 47]; (3) Deputy Sheriff Andrews, who was concerned with Petitioner Jackson's physical state between 6:00 and 7:00 p.m., when he observed his staggering footsteps and bloodshot eyes, that he advised the deceased to drive rather than allowing Petitioner Jackson to do so since the latter was "too drunk" to drive [A. 55]; and Petitioner Jackson who admitted sharing with Mrs. Cole, one fifth of Old Crow, one fifth of Wild Turkey, and undetermined amount of beer, and a pint of something else. [A. 59-60].

Commonwealth Exhibit Number 20 shows that at the time of her death Mrs. Cole had a blood alcohol level of 0.17%. According to a policy statement of the American Medical Association and the National Safety Council:

> 'Blood alcohol of 0.10% can be accepted as prima facie evidence of alcoholic intoxication, recognizing that many individuals are under the influence

> in the 0.05 to 0.10% range.' [A. Moenssens, R. Moses & F. Inbau, *Scientific Evidence in Criminal Cases*, 238 (1973)].

Therefore, if Mrs. Cole had at the time of her death a blood alcohol level well in excess of that level deemed to indicate intoxication, then surely Petitioner Jackson was at least as intoxicated as she. This can be inferred from the testimony of Deputy Sheriff Andrews when he stated that "[t]hey had been drinking. I would say Mr. Jackson had more than Mrs. Cole, it appeared to be that way." [A. 52]. It is thus safe to say that Petitioner Jackson, after drinking the entire day, was plainly very intoxicated.

As has already been noted the Commonwealth of Virginia recognizes that a mind may be so bewildered from intoxicating beverages as to be entirely incapable of premeditation. From all the evidence before this Court, it is apparent that Petitioner Jackson was in such a state of intoxication that he was incapable of a premeditated murder.

Even the Chief Prosecutor, Oliver D. Rudy argued for a conviction of second degree murder since he felt that there was not "evidence that would lift it above that." [Tr. 112]. In particular he was disturbed by the intoxication of Petitioner Jackson at the time of Mrs. Cole's death. [A. 113]. The judge of his own volition raised the conviction to first degree murder after noting that Petitioner Jackson had not been arrested for being drunk in public by either of the two police officers or the deputy sheriff. [Tr. 116]. This can be explained by the latter's testimony when he admitted that he wanted to get Mrs. Cole and Petitioner Jackson out of the diner in order that he could eat his meal without their presence. [A. 53-54]. Certainly if he had arrested Petitioner Jackson this would have disrupted his meal even further than his short discussion outside. The other two police officers apparently had little contact with either Mrs. Cole or Petitioner Jackson.

B. The Other Facts Of The Case Do Not Show Evidence Of Premeditation Such That A Rational Trier Of Fact Could Have Found Guilt Beyond A Reasonable Doubt.

Admittedly the events at the death scene sound bizarre as related by a man whose intoxication at the time was substantial. The statement given by Petitioner Jackson shows two individuals in a drunken stupor who quarreled over whether they would have sexual relations. A knife appeared and then a gun. After an ensuing struggle Mrs. Cole was shot. Certainly, if one was intoxicated the number of shots, whether one or two, is irrelevant.

It is clear that the deputy sheriff, a trained law enforcement officer, was not alerted to any circumstances or innuendos which would have caused him to think that the gun and a knife he saw would be used violently by either person. The fact that Mrs. Cole laughed when Petitioner Jackson mentioned having

sex with her did not cause Deputy Sheriff Andrews to become alarmed to the slightest degree. If Petitioner Jackson had intended to force his intentions upon Mrs. Cole, he certainly would not have so freely shown the gun to the deputy sheriff, nor hinted that he and Mrs. Cole were going to have sexual relations.

C. That A Judge Rather Than A Jury Convicted The Petitioner Should Not Change The Fact That No Rational Trier Of Fact Could Have Found Him Guilty Beyond A Reasonable Doubt Of First Degree Murder.

Evidence introduced for the Commonwealth included several black and white, and one color, photographs of the body of the deceased at the discovery site. [A. 56-57]. The court, in hearing final arguments from both the Commonwealth and the Defense, began to propound on behalf of a conviction for murder in the first degree. [Tr. 112-114]. When the defense insisted that intoxication mitigated any specific intent to commit premeditated murder, the Honorable Judge Ernest P. Gates replied, referring to the photographs of the semi-nude body of Mrs. Cole:

> The Court: Did you see the picture of her face and the mutilation? [Tr.115].
>
> . . .
>
> The Court: Take a look at that picture again. To me it is a very horrible looking picture. [Tr.115].
>
> . . .
>
> The Court: Look at the face. [Tr.115].
>
> . . .

> The Court: Look where she was shot. [Tr.116].

The photographs, while not pleasant, could in no way be interpreted as *prima facie* evidence of premeditation. The "horrible looking picture" noted by Judge Gates obviously referred to the color photograph taken when the body was turned over from its face-down position. The natural state of decomposition, plus the insect and rodent markings on the face, doubtlessly had an emotional impact upon the court, already concerned by the fact that Mrs. Cole had befriended the Petitioner when he was released from jail. [Tr.114].

The photographs are indicative of violent death by gunshot wounds. The autopsy produced no other extreme bodily contusions that would point to premeditation on the part of Petitioner Jackson. It is submitted that trial court was swayed by the unpleasant aspects of the photographs, and erroneously interpreted the natural state of the corpse. The judge extrapolated conclusions from the photographs which were contrary to all evidence as produced by the coroner's examination.

Mrs. Cole, after a spat, persuaded Petitioner Jackson to get back into the car with her and then drove the two of them to the secluded church. What resulted later was the result of a drunken stupor. The events of August 24, 1974 did not reveal sufficient evidence of premeditation to convict Petitioner Jackson of murder of the first degree beyond a reasonable doubt.